No. 989

SUPREME COURT, U. S. No. 19355

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PAUL F. PERATI, et al.,
Petitioners,
-vs-
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
AND
MOTION FOR LEAVE TO FILE A PETITION FOR
A WRIT OF CERTIORARI

PAUL F. PERATI
6110 Aspinwall Road
Oakland, California
In Propria Persona

I N D E X
SUBJECT INDEX

	Page
MOTION FOR LEAVE TO FILE.....	A
OPINION BELOW.....	1
JURISDICTION.....	2
QUESTIONS PRESENTED.....	2
CONSTITUTIONAL PROVISIONS, CASES AND STATUTES INVOLVED.....	4
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT....	10
ARGUMENT.....	13
APPENDIX A.....	1a
APPENDIX B-1.....	1b
APPENDIX B-2.....	5b
APPENDIX C.....	1c
APPENDIX D.....	1d
APPENDIX E.....	1e

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PAUL F. PERATI, et al.,
Petitioners,
-vs-
UNITED STATES OF AMERICA,
Appellee.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, and to the HONORABLE ASSOCIATE JUSTICES of the UNITED STATES SUPREME COURT:

Paul F. Perati, in propria persona, petitioner, respectfully moves this Court for leave to file the petition for a Writ of Certiorari, annexed hereto, under Rule 19, Rules of the United States Supreme Court, directed to the United States Court of Appeals for the Ninth Circuit, to review the judgment of that court, entered November 8th, 1965, which judgment affirmed the judgment of the District Court,

more particularly described in the petition, and for such other and further relief as may be just and proper.

PAUL F. PERATI

In Propria Persona

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PAUL F. PERATI, et al.,
Petitioners,
-vs-
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Paul F. Perati, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeal for the Ninth Circuit, and in support thereof, requests consideration of the following:

OPINION BELOW

The opinion of the U.S. Circuit Court of Appeal, for the Ninth Circuit, entered November 8th, 1965, is reported in 352 Federal Reported, 2nd Series 788, and is

Appendix A, appended to this petition.

The district court did not write a formal opinion, its judgments appear in volume one of the transcript of the record at pages 30 and 37, and are appended to this petition and marked Appendix B.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit, was rendered and entered on November 8th, 1965, see appendix A.

The jurisdiction of this Court is invoked under Rule 19, Rules of the United States Supreme Court, 28 U.S.C. 1254, and 28 U.S.C.A. 1651.

QUESTIONS PRESENTED

I

Does an Appropriation Act that allows the purchase of land, violate "Due Process", when the Act is so vague, and lacking in the guides and standards necessary in any delegation of legislative authority, that reasonable men may differ and guess as to what particular parcels of land, and in which of the 50 States,

the Congress authorized a particular officer of the Government to procure the real estate?

II

Must an Appropriation Act that appears to authorize an officer of the Government to procure real estate for a public use, contain express legislative power to authorize the condemnation of private property, including a legislative finding of public necessity and public use, as well as the usual elements necessary in a condemnation action?

III

Does the due process provision of the Fifth Amendment that voids penal statutes that are uncertain and vague, also apply to civil condemnation actions, where the alleged enabling act is so vague, indefinite and uncertain, that persons of ordinary intelligence could guess at its meaning, and arrive at different conclusions?

IV

When Congress has authorized the Secretary of the Interior to acquire land for the administration and development of Yosemite National Park, and selected the El

Portal area, as per 17 U.S.C. 47-1, may an officer of the Executive Branch of the Government, select another area when in his opinion it is necessary or advantageous to the government to do so?

V

When Congress expressly excludes certain land (entry made under the land laws in October, 1890, by 16 U.S.C. 471(c); and again in February, 1905, 16 U.S.C. 46; and again in September, 1958, by 16 U.S.C. 47-1 (d) when the site for the administration of Yosemite National Park was selected, from ownership by the Federal Government, may an officer of the Government acquire the land when in his opinion it is necessary or advantageous to the Government to do so?

VI

When the boundary of land is in issue, must the party having the duty to go forward, establish the boundary by a preponderence of the evidence?

CONSTITUTIONAL PROVISIONS, CASES AND STATUTES INVOLVED

U.S. Constitution	Page
Due Process Provision of the Fifth Amendment.....	11

Page

Cases

Perati v. U.S., 352 Fed. Rep. 2d 788..... 1

U.S. v. Kennedy, 278 Fed. 2d 121..... 8,12

U.S. v. Rauers, 70 Fed. Rep. 748(1) Express legislative power is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such power must be strictly construed..... 10

Panama v. Ryan, 293 U.S. 388.... 13

Schechter Poultry v. U.S., 295 U.S. 495..... 13

Jordan v. DeGeorge, 341 U.S. 223, 231; Despite the fact this is not a criminal statute, we shall examine the application of the vagueness doctrine to the appeal.. 14

Corpus Juris Secundum

Corpus Juris Secundum, vol 29, page 806; Such power of eminent domain being in derogation of common right, the acts conferring it are to be

Page

strictly construed in favor of the landowner..... 10

Statutes

Rules of the United States Supreme Court, Rule 19..... A,2

28 U.S.C. 1254..... 2
28 U.S.C. 1651..... 2
28 U.S.C. 1358..... 6
16 U.S.C. 471(c); 26 Stat. 650.. 4,8,12
16 U.S.C. 46..... 4
16 U.S.C. 47-1..... 4,9,13,14
40 U.S.C. 257..... 9
75 Stat. 246, 249..... 10,12,14

STATEMENT OF THE CASE

The jurisdiction of the district court rested upon 28 U.S.C. Sec. 1358.

The United States condemned the fee titled to the parcels of land that are in issue, by a complaint (page 3, volume one, Transcript of Record) in which they cite as authority for the taking, four statutes, two procedural statutes, an Appropriation Act, and a Reserved Forest Lands Act dated October 1st, 1890.

This petitioner properly answered the complaint, his "further separate and affirmative defenses" were striken by the District Court on August 17, 1962, see Appendix B.

This petitioner filed a Motion to Dismiss, see pages 33 through 36, Transcript of Record, vol. one, and pages 10 through 21, Transcript of Record, vol. two. The Honorable Judge MacBride denied this motion to dismiss, see Page 19, Transcript of Record vol. two.

On December 16, 1963, this petitioner had his exhibits A and B marked for identification, see pages 19 and 20, Transcript of Record vol. two.

On December 18, 1963, the pre-trial conference took place, see pages 22 through 28, Transcript of Record, vol. two. (Our pre-trial memorandum had been properly filed on December 13, 1963, see pages 43a, 43b, and 43c, Transcript of Record, vol. one).

After the pre-trial conference, although objected to by this petitioner, the only issue left by order of the Court, was the question of compensation, see page 26, vol. two, Transcript of Record.

AS OF THIS TIME, WE HAVE NO PLEADING IN THE COMPLAINT, OR EVIDENCE, TO SUSTAIN A CONCLUSION THAT THIS LAND IS WITHIN THE EXTERIOR BOUNDARIES OF YOSEMITE NATIONAL PARK. NOR HAS THE GOVERNMENT CITED ANY LEGISLATIVE FINDING OF A REQUIRED PUBLIC USE OR PUBLIC PURPOSE, EXCEPT THE CITATION OF THE ACT OF OCTOBER 1, 1890 (26 Stat. 650, also cited as 16 U.S.C. 471(c)), AND THIS CITATION RELIED ON AND PLEADED BY THE GOVERNMENT, PROVIDES FOR THE EXCLUSION OF THE LAND AREA THAT CONTAINS THE PARCELS THAT ARE THE SUBJECT OF THIS PETITION.

On January 20, 1964, before the Honorable Judge Chase A. Clark, we renewed our motion to dismiss, and offered in evidence our proposed exhibits marked A & B, and the Court ruled the only issue before the Court was the issue of compensation, pages 4 & 5, the back of vol. two, Transcript of Record.

We did appeal to the United States Court of Appeals, and filed an Opening and Reply Brief, see Appendix D.

On Monday, February 8th, 1965, Mr. A. Lawrence Burbank, Esquire, Assistant United States Attorney, argued and persuaded the Court of Appeals that this case was similar to United States v. Kennedy, 9 Cir., 278 F.2d 121; that the Ap-

propriation Act was the enabling act, or authority to bring in 40 U.S.C. 257, Ch. 728, 25 Stat. 357.

The United States Court of Appeals, for the Ninth Circuit, in its judgment rendered and filed November 8, 1965, held the land at issue was within the exterior boundaries of Yosemite National Park, (this without support in the record).

The Court of Appeals next cited Section 1 of an Act approved August 1, 1888, Ch. 728, 25 Stat. 357, 40 U.S.C., Sec. 257, that provides that in every case in which an officer of the Government is authorized to procure real estate for public use, he may proceed by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so.

The next step by the Court of Appeals was the citation of an Appropriation Act for the National Park service in the 50 States, to be used within as well as without the continental United States, (per. nt.: Also to be used in connection with the ADMINISTRATION and DEVELOPMENT of Yosemite National Park, BUT NOT TO BECOME A PART OF YOSEMITE NATIONAL PARK, 47-1(e) Title 16 U.S.C., but to be used in El Portal, thus Congress selected the land to

be acquired), see the Department of the Interior and Related Agencies Appropriation Act, 1962, approved August 3rd, 1961, 75 Stat. 246, 249. The Court of Appeals then affirmed the judgment below.

REASONS FOR GRANTING THE WRIT

I

Consideration by this Court is necessary as the holding below, departs from the historical land mark case of U.S. v. Rauers, 70 Federal Rep. 748(1), which requires that express legislative power is necessary to condemn private property, and such claimed power must be strictly construed; as well as departing from the doctrine the writers feel is in order, and have stated in Vol. 29, Corpus Juris Secundum, page 806; "Such power of eminent domain being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner.

Thus, as the Court of Appeals, 9 Cir., in this action has departed from the accepted and usual construction of condemnation statutes, it is necessary for this Court to exercise its power of supervision, to the end that this important condemnation doctrine be

restated, so all circuits will have the benefit of this Courts supervision.

II

It is of judicial importance that it be clearly decided the extent that the void for uncertainty and vagueness provision of the Due Process clause of the Fifth Amendment, which generally applies to criminal statutes, should apply to condemnation actions.

III

It is important for the Congress, as well as others, that this Court determine what elements an Appropriation Act in and of itself, must contain, to be considered adequate authority for an officer of the Government to procure real estate; (a) when the appropriation act contains no reference to a public necessity or public use; or (b) to be considered adequate authority to acquire land within or without a national park, when the appropriation act contains no reference to a established national park or even a particular State.

IV

This decision has departed from the accepted and usual course of judicial

proceedings, all of which appears from the following:

A

The complaint below, page 3, Transcript of Record, vol. one, lines 8 through 11, pleads the authority for the taking is the act of October 1, 1890, 26 Stat. 650, plus the Appropriation Act approved August 3, 1961 (75 Stat. 246) WHICH MAKES FUNDS AVAILABLE FOR SUCH PURPOSE. Thus, as the United States pleaded the Appropriation Act made funds available for the purposes of 26 Stat. 650, it was error for the Court of Appeals to hold the authority to take my land flowed from the Appropriation Act.

B

In Kennedy, 278 F.2d 121, this same Court of Appeals remanded the case as it had not been determined if the Kennedy tract was within the boundaries of a park. In the instant appeal, no evidence was offered by the Government that could establish that this land was within the exterior boundaries of Yosemite National Park, nor has the United States pleaded in the complaint, that this land is within the exterior boundaries, thus, in addition to the other points, a remand on

the boundary point would be within the usual course of judicial proceedings.

C

Congress having laid down the guides and standards to be applied in connection with the ADMINISTRATION and DEVELOPMENT of Yosemite National Park, in Title 16, U.S.C. 47-1, this decision departs from the usual course of judicial proceedings, in that it conflicts with the expressed legislative directive above cited, as well as with the principles on delegation of legislative authority, as laid down by this Court in Panama v. Ryan, 293 U.S. 388, and Schechter Poultry v. U.S., 295 U.S. 495.

ARGUMENT

This case is of great importance as it represents a dangerous incursion by the Department of the Interior into fields reserved to our legislative and judicial branches, and this invasion is in direct defiance of the legislative mandate establishing Yosemite National Park, where it is expressly stated bona fide entry made under law shall not be subject to the jurisdiction establishing the park, as well as the Act tailored by Congress in 1958, expressly providing for the ADMINISTRATION and DEVELOPMENT of Yosemite National Park, and

prohibiting the lands acquired from being a part of Yosemite National Park, and stating that the lands shall not be subject to the laws and regulations governing the park, 16 U.S.C. 47-1(a)(d),(e).

The omnibus Appropriation Act, 75 Stat. 246, which the Circuit Court felt was adequate authority to acquire land by condemnation, is so uncertain, vague, and lacking in guides and standards, that it violates the due process provision of the Fifth Amendment. This statute is so vague, that intelligent men must guess at the meaning of the provision "and not to exceed $5,350,000 for the acquisition of lands, interest therein, improvements, and related personal property", unless it is construed with statutes such as 16 U.S.C. 47-1, which gives it clarification, and supplys the required guides and standards.

This Court in 1950, in Jordan v. DeGeorge, 341 U.S. 223, 231, stated "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case." We respectfully request the application of the vagueness doctrine to our appeal.

A boundary, or line that shows the jurisdiction that land is within and

subject to, has always been of great importance in our system of American Jurisprudence. Under our American heritage, we feel each parcel of land is unique, thus a question of boundary must be settled by clear and convincing evidence, and this was not done in this case.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, San Francisco, California, commanding said Court to certify and send up to this Court a full and complete transcript of the record and all proceedings below, to the end that the case may be reviewed and determined by this Court; that the judgment of the Circuit Court be reversed, the complaint dismissed, and a conclusion of law and findings of fact supported by evidence on the boundary question be made, and that your petitioner be granted such other and further relief as may appear proper.

Dated: February 2, 1966

Respectfully submitted,

PAUL F. PERATI
In Propria Persona

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL F. PERATI, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,355

[November 8, 1965]

Appeal from the United States District Court for the Northern District of California, Northern Division.

Before POPE, KOELSCH and BROWNING, Circuit Judges.

POPE, Circuit Judge.

This is an appeal from a judgment condemning two lots or parcels of land belonging to the appellants and fixing and awarding compensation for the taking thereof. The land in question is situated within the exterior boundaries of Yosemite National Park in the State of California. These parcels were not Park land for the reason that prior to the creation of the Park homestead entry had been made thereon by a predecessor in interest of the appellants and a homestead grant had followed.

In its complaint seeking condemnation the United States alleged that these with other parcels were sought to be taken for use in connection with the administration, protection and development of the Yosemite National Park.

The appellants resisted the attempted condemnation primarily on the ground that the taking by the United States in this proceeding was not authorized by any Act of Congress. Judgment of condemnation was entered vesting title in the United States and fixing and awarding certain sums as compensation to the

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- 114 Parcels of Land, aggregating 27.03 acres, more or less, in the County of Mariposa, State of California; ZELLA E. PATTERSON; et al., Defendants.	Filed Aug 17, 1962 Civil No. 8487

MEMORANDUM AND ORDER

The Government, in this eminent domain action, has moved to strike defendant Paul F. Perati's "further separate and affirmative defenses" as immaterial, the conclusions of the pleader, and not presenting justiciable issues. The Government has initiated these proceedings for the condemnation of certain lands for the administration, protection, and development of Yosemite National Park. The Government's estimate of just compensation has been deposited with the Court, pursuant to Title 40 U.S.C. §258a.

In the first portion of his answer, defendant Perati sets forth his denial of each of the allegations in the Government's complaint, and further specifically

denies that the sum deposited by the Government is just compensation. As to this latter point, the Court has no authority to question the sufficiency of a deposit which has been submitted in good faith (See: e.g., In re United States, 257 F.2d 844).

The Government's objection, and motion to strike, is restricted to that portion of defendant Perati's answer which purports to set forth certain affirmative defenses. Although the Court gives wide latitude to one who pleads his case in propria persona, it is still required that a proper basis for submitted pleadings must appear. Construing defendant Perati's answer as rationally and liberally as possible, there appear to be seven issues set forth therein:

1. The Government is restricted in its actions to those acts for which it has been granted specific authority.
2. Uncontrolled discretion is an invalid use of the legislative power.
3. No cause of action is stated.
4. The plot, upon which the taking herein is based, is inaccurate.

5. The Government is under a duty to use undeveloped areas within Yosemite Park rather than taking defendant's property.

6. The Government is estopped to claim this private property.

7. In view of the problems of the atomic age, it is Governmental policy to encourage a country home.

These arguments have been disposed of by previous decisions. There is no doubt of the power of the Government to condemn land for public purposes, and the nature and extent of the estate so taken for public use is not a proper subject of judicial review (United States v. City of Oakland, 37 F.Supp. 297, aff'd 124 F.2d 959). Beyond the "public purpose" requirement (See: Berman v. Parker, 348 U.S. 26), there is no necessity that the Government take certain property to the exclusion of other property. The development of Yosemite Park is clearly a sufficient public purpose.

In view of the above observations, it is clear that defendant Perati's answer contains a great amount of extraneous matter, all of which must be stricken.

IT IS THEREFORE, ORDERED that the "further separate and affirmative defenses" contained in defendant Perati's answer, commencing on Line 11, Page 2, and ending on Line 12, Page 4, be, and they are, hereby stricken.

DATED: August 17, 1962.

/s/_____
UNITED STATES DISTRICT JUDGE

#1169

Filed Jan 29, 1964

#329

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff -vs- 114 Parcels of land, aggregating 27.03 acres, more or less, in the County of Mariposa, State of California, ZELLA E. PATTERSON, PAUL F. PERATI, EVELYNE A. PERATI, et al., Defendants	Civil No. 8487

FINAL JUDGMENT AS TO PARCELS 85 AND 87

This matter came on regularly for trial before the above entitled Court,

sitting without a jury, a jury having been expressly waived, on the 20th day of January, 1964, the Honorable District Judge Chase A. Clark presiding, plaintiff being represented by A. Lawrence Burbank, Assistant United States Attorney, and defendant Paul F. Perati, in propria persona, and on behalf of Evelyne A. Perati, his wife, and the Court having heard the testimony and having examined the evidence offered by the respective parties, the Court, being fully advised in the premises, finds:

I

That the complaint was filed in this action on May 28, 1962 and on the same day a declaration of taking No. 1 was filed and the sums of FIVE HUNDRED AND NO/100 DOLLARS ($500.00) and FOUR HUNDRED FIFTY AND NO/100 DOLLARS (450.00) were deposited in the Registry of the Court as estimated just compensation for the taking of the fee simple title to Parcels 85 and 87, respectively, subject however, to easements for streets, highways, alleys, sewer, gas and water pipe lines, and other public utilities, if any.

II

That the use for which the property hereinafter described is taken and condemned by plaintiff is one authorized by

law, and the said property and the taking thereof is necessary and suited to said use.

III

That all persons interested directly or indirectly in the property hereinafter described have been personally served with process, or have appeared in this action; that said property, together with all claimants or parties interested therein is within the jurisdiction of this Court which has power and authority to enter this final judgment.

IV

That at the time of and immediately prior to the commencement of this action title to Parcel 85 was vested in Paul F. Perati and Evelyne A. Perati, his wife, as joint tenants, and said Paul F. Perati and Evelyne A. Perati, his wife, were the owners of Parcel 87, and said defendants are the only persons, firms or corporations entitled to the compensation fixed by the Court as set forth in paragraph V hereof.

V

That the fair market value for the taking of Parcels 85 and 87, together

with any and all damages resulting therefrom, is as follows:

PARCEL NO.	FAIR MARKET VALUE
85	$ 450.00
87	$ 450.00

VI

That disclaimers have been filed by Pauline D. Massoni, Dante A. Massoni, and the County of Mariposa, whom the Court finds have no interest in Parcels 85 and 87, or in the compensation fixed by the Court as set forth in paragraph V hereof.

VII

That the property subject of this final judgment is situate in the County of Mariposa, State of California, and more particularly described as follows:

PARCEL NO. 85

Lot 14, Block 15,
Foresta Townsite

PARCEL NO. 87

Lot 6, Block 16,
Foresta Townsite

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the fee simple title to said property hereinabove described, subject, however, to easements for streets, highways, alleys, sewer, gas and water pipe lines, and other public utilities, if any, vested in the United States of America on the 28th day of May, 1962, upon the filing in this action of the declaration of taking No. 1 and the depositing in the Registry of the Court of the sums aforesaid, and said land, subject to the easements aforesaid, if any, vested in the United States of America free and discharged of all liens and claims of any kind whatsoever; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the taking of Parcel 85, hereinabove described, the sum of FOUR HUNDRED FIFTY AND NO/100 DOLLARS ($450.00), without interest, be and it is hereby awarded to defendants Paul F. Perati and Evelyne A. Perati as full, adequate and just compensation for the taking of the estate and interest condemned by the above entitled action in and to Parcel 85, and any and all damages resulting therefrom, and the Clerk of the above entitled Court is hereby directed to pay forthwith to said defendants Paul F. Perati and Evelyne A. Perati

the sum of FOUR HUNDRED FIFTY AND NO/100 DOLLARS ($450.00), without interest, and the Clerk is further directed to pay forthwith to the Treasurer of the United States the sum of FIFTY AND NO/100 DOLLARS ($50.00), being the balance on deposit in the Registry of the Court for said Parcel 85, and the Clerk is further directed to enter satisfaction of this judgment of record as to said Parcel 85 forthwith upon the payment of the above mentioned sums; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the taking of Parcel 87, hereinabove described, the sum of FOUR HUNDRED FIFTY AND NO/100 DOLLARS ($450.00), without interest, be and it is hereby awarded to Paul F. Perati and Evelyne A. Perati as full, adequate and just compensation for the taking of the estate and interest condemned by the above entitled action in and to Parcel 87, and any and all damages resulting therefrom; and it appearing that the sum of FOUR HUNDRED FIFTY AND NO/100 DOLLARS ($450.00) has heretofore by order of this Court been paid to said defendants on account of compensation to be awarded for the taking of Parcel 87, the Clerk of this Court is hereby directed to enter satisfaction of this

judgment of record as to Parcel 87 forthwith.

Dated: January 29th, 1964.

/s/_____
Judge, United States District Court, Northern District of California

ENTERED IN CIVIL DOCKET, 29 Jan. 1964.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. DAN T. KENNEDY, *Appellee.*	No. 16,179 April 13, 1960

Appeal from the United States District Court for the District of Alaska, Third Division

Before: Hamley, Jertberg, and Koelsch, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action to acquire by condemnation two tracts of land within the exterior boundaries of Mount McKinley National Park, in Alaska. Pursuant to a stipulation thereafter entered into with the owner of one of these tracts, an uncontested judgment was entered under which the government acquired that tract. Dan T. Kennedy, owner of the other tract, moved to dismiss the complaint on the ground that it did not state a claim upon which relief can be granted.

The motion was granted and an order dismissing the action as to the Kennedy tract was later entered. The trial court held that the complaint failed to disclose that there was statutory authority under which the Secretary of the Interior could condemn land in Mount McKinley National Park.[1] The correctness of this determination is the only question before us on this appeal by the government.

The acts relating to the establishment, boundaries, and control of Mount McKinley National Park neither authorize nor forbid

[1]The opinion and supplemental opinion of the trial court are reported in 160 F.Supp. 30, and 162 F.Supp. 939.

the acquisition of land by condemnation.[2] Likewise, the general statutes relating to the jurisdiction and powers of the National Park Service, as such statutes existed in 1951 when the complaint herein was filed, contain no such authorization applicable to the particular tract in question.[3] The government, however, relies upon the general condemnation act of August 1, 1888, as amended, 40 U.S.C.A. sec. 257, as providing the necessary statutory authority to condemn the Kennedy tract.

The material portion of 40 U.S.C.A. sec. 257 reads as follows:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . . ."

It has been repeatedly held, and is not here disputed, that under this statute the government's power to condemn is coextensive with its power to purchase. United States ex rel. T.V.A. v. Welch, 327 U. S. 546, 554. But, as the quoted words indicate, the authority to acquire lands which will make the general condemnation statute operative is not conferred by that act but must be found elsewhere. United States v. Certain Lands in Town of Narragansett, R. I., C.C., 145 Fed. 654.

The authority needed in order to acquire the Kennedy tract is found neither in the statute establishing the park[4] nor in the general statutes relating to the jurisdiction and powers of the National Park Service. But the government relies upon chapter VII of the general appropriation act of 1951, appropriating funds for the National Park Service, as providing the necessary statu-

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[2]Title 16 U.S.C.A. secs. 347-355.

[3]Title 16 U.S.C.A. sec. 1-18d.

[4]There are numerous instances in which the Secretary of the Interior, through the National Park Service, has been given express authority of this kind with reference to other parks or places. Examples of such statutory provisions are cited in the opinion of the trial court. 160 F.Supp. 30, at 32.

tory authorization to acquire the Kennedy tract.[5] One provision of chapter VII of that act appropriates $19,667,000 for the construction and improvement of roads, trails, parkways, buildings, utilities, and other physical facilities, "and the acquisition of lands, interests therein, improvements, and water rights; to remain available until expended. . . ."

Appellee concedes that the statutory authorization to procure real estate may be evidenced by the making of an appropriation as well as by a specific authorization to acquire. See Polson Logging Co. v. United States, 9 Cir., 160 F.2d 712, 714. He denies, however, that the 1951 appropriation act upon which the government relies was intended to confer authority upon the Secretary of the Interior, acting through the National Park Service, to acquire land in Mount McKinley National Park.

This appropriation, on its face, contains no direct reference to Mount McKinley National Park or any other national park. In so far as the statutory language indicates, the appropriation is for "the acquisition of lands" in any national park. If, then, this appropriation item is to be given a more restricted meaning so as to exclude Mount McKinley National Park, it must be due to compelling legislative history or the limiting effect of other statutes.

With regard to legislative history, appellee argues first that the National Park Service represented and Congress understood that the item for acquisitions would be used only to acquire lands in certain designated areas not including Mount McKinley National Park. This being so, appellee reasons, no part of this appropriation item may be used to acquire land within the exterior boundaries of Mount McKinley National Park.

The National Park Service for fiscal year 1951 requested a total of $275,000 for the purpose of acquiring private properties within the various national parks. This item was deleted by the House of Representatives, but was restored by the Senate.[6] On

[5] Act of September 6, 1950, 64 Stat. 595, 679, 692.

[6] In restoring this item the Senate Committee explained in its report: "The increase of $275,000 approved by the committee is for acquisition of privately owned lands within the authorized boundaries of established national park areas." S.Rep. No. 1941, 81st Cong., 2d Sess., 160 (1950) Cong. Doc. Series No. 11370.

conference between the House and Senate Committees the Senate version of the act was adopted.[7] There is nothing in the committee reports to indicate that expenditures from this $275,000 item for acquisitions were limited to particular national parks, or that Mount McKinley National Park was excluded therefrom.

Appellee, however, calls attention to the two lists referred to in the Senate hearings in which specific parks are named. One such list is found in the justification which the National Park Service filed in support of the $275,000 appropriation item, as follows:

> "It is proposed to use the $275,000 to acquire most urgently needed land in various areas, including Glacier, Carlsbad Caverns, Mesa Verde, Olympic, Yosemite, Lassen Volcanic, and Sequoia and Kings Canyon National Parks; Colonial and Saratoga National Historical Parks; Gettysburg National Military Park; Manassas National Battlefield Park; and in Dinosaur, Glacier Bay, Death Valley, Saguaro, and Joshua Tree National Monuments."
>
> U. S. Congress Senate Hearings, vol. 10, 224 (1949-50)

Mount McKinley National Park is not included in the list set out in the justification. It will be noted, however, that this was not represented to be an all-inclusive list. The justification proposed that the $275,000 be used "to acquire most urgently needed land in various areas, *including* . . . ." the named parks and monuments. (Emphasis supplied.) Explaining the list of parks and monuments which was made a part of the justification, Newton B. Drury, Director of the National Park Service, told the Senate subcommittee (Id. at 230):

> "Mr. DRURY. Yes, those were given in our justification as examples. This is a flexible fund. Now, you asked me about

---

[7]Acceptance of the $275,000 item restored by the Senate was not specifically mentioned in the conference report as it did not require an amendment of the text. The adjustment, however, is reflected in the amount actually appropriated. The statement of the managers on the part of the House notes that the action on the $19,667,000 item "will necessitate some flexibility to permit adjustment of items originally scheduled under . . . construction." H.R. Rep. No. 2991, 81st Cong., 2d Sess., 34, 41 (1950) Cong. Doc. Series No. 11384.

Colonial, and it may well be that there will be purchases there.

"Senator HAYDEN. There may or may not?

"Mr. DRURY. Yes, there may or may not."

A second list which did not include Mount McKinley National Park was filed with the committee by Senator Cordon. However, this list omits eight parks and monuments which were named in the justification,[8] and includes seven parks and monuments which were not named in the justification.[9] This circumstance, it seems to us, is a further indication of the intended flexibility of the $275,000 acquisition item. The written explanatory statement which accompanied the list supplied at the request of Senator Cordon also makes it clear that the list of parks and monuments there named was not intended to be exclusive, but only illustrative.[10]

Senator Cordon later asked Drury whether the justification for $4,827,000 requested for acquisition of lands and water rights carried an itemization of what acquisitions the National Park Service intended to make with the full amount of the request.

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[8]Carlsbad Caverns, Mesa Verde, and Sequoia National Parks; Colonial and Saratoga National Historical Parks; and Dinosaur, Glacier Bay, and Death Valley Monuments.

[9]Mount Rainier, Rocky Mountain, and Big Bend National Parks; Petersburg National Historical Park, Fredericksburg National Military Park; and Muir Woods and Capital Reef National Monuments.

[10]This explanatory statement reads as follows:

"**Acquisition of privately owned lands within the authorized boundaries of established areas, $275,000.**

"It is proposed to use this general land acquisition fund primarily to acquire lands in various areas which can be had at bargain prices and such other lands that are urgently needed for construction of public facilities. It is not possible to list the specific lands which will be acquired, for it is not entirely known which properties will be placed on the market, appraisals have not yet all been made and negotiations with the landowners have not been entered into. However, if the sum is granted, it is proposed that it will be expended somewhat as follows: . . ." Id. at 229.

Drury replied: "Well, except for that $275,000 item, it does." Id. at 241.[11]

The legislative history reviewed above does not, in our opinion, bear out appellee's contention that the National Park Service represented and Congress understood that the $275,000 item would be used only to acquire lands in connection with parks and monuments specifically named in the justification and written statements submitted to the Senate subcommittee. We therefore conclude that such legislative history does not warrant a reading of the appropriation item which would exclude its use for land acquisitions within the exterior boundaries of Mount McKinley National Park.

Appellee also argues that the legislative history of the appropriation indicates that the $275,000 item may be used only to acquire lands where the owner is willing to sell and where the government can get a bargain.[12]

There can be no doubt that the agency intended to use the acquisition fund primarily for purchases at bargain prices. It was largely because of this that the agency could not supply the committee with a list of the specific lands which would be acquired.[13] But it was at no time represented that property would never be acquired by condemnation. On the contrary, the committee was told that this was a continuing program under which

[11]In explanation of this amount Drury's prepared statement recites:

"For the past few years, the Congress has provided from $200,000 to $300,000 for the acquisition of privately owned lands located within the boundaries of the areas administered. These owned lands are subject to unsightly commercial development; they stand in the way of ultimate development of the parks and monuments; and they present one of the Service's most perplexing problems in the fields of management and protection. Values of these lands have increased considerably during the past decade because of the enormous increase in public use. They must not be subdivided for summer-home purposes or otherwise developed commercially if the best interests of the Government and the visiting public are to be served." Id. at 195-196. See, also, page 204 of the same report.

[12]Appellee goes outside of the record in telling us that the National Park Service has never consulted him concerning the purchase of the tract here in question.

[13]See footnote 10.

considerable property had been acquired by condemnation in past years.[14]

Nothing in the legislative history as reviewed above warrants us in reading such a limitation into that statute.

Appellee argues further that the legislative history of the 1951 appropriations act indicates that the agency was merely attempting to secure necessary funds to buy lands for which it already had purchase authority. Since there was no separate purchase authority with respect to Mount McKinley National Park, it is contended that the appropriation may not be utilized in acquiring the Kennedy tract.

The item of legislative history to which appellee first refers in support of this view is a statement made by D. Otis Beasley, Acting Director, Division of Budget and Administrative Management. Referring to the lump sum item for "construction and land acquisition," Beasley stated that it consolidated all of the appropriations contained in the 1950 appropriation act for construction and land-acquisition activities of the National Park Service. He then stated:

> "The language proposed for this item does not in any way broaden the authority heretofore carried in the appropriation items for this purpose.
>
> "Mr. NORRELL. It simply constitutes a consolidation of those items and gives you no additional power?
>
> "Mr. BEASLEY. Yes, sir." Id. pt. 6, at 1650.

The statement that this item in the 1951 act gave the agency no additional powers was in no sense a representation that it

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[14] Arthur E. Demaray, Associate Director of the National Park Service, stated to the committee:

> "When we have had to condemn, we have found that our condemnation prices have exceeded our appraisals. So, most of our work has been by actual negotiation.
>
> "In 1949, we acquired some land under condemnation. It is included in total purchases of 1,350.83 acres at an appraised value of $156,971.67. The contract price has been $111,993; and we have $48,625 in condemnation cases, awards of which have not yet been made. Again our prices for negotiated property have been lower than the amounts awarded by the courts." Hearings on Appropriation Bill, 1951, Before the Subcommittee on Interior Department of the House Committee on Appropriations, 81st Cong., 2d Sess., pt. 2, at 357 (1950).

would be utilized only in acquiring lands in connection with which there was a separate statutory authorization. Under the 1950 and preceding appropriation acts the agency had expended funds from a similar item for acquisition concerning which there was no separate authorization.[15] Hence a similar utilization of funds from the 1951 appropriation involved no broadening of authority.

Appellee also refers to a colloquy between Senator McCarran and Drury occurring during the Senate subcommittee hearing, which we quote in the margin.[16] Mr. Drury was of course mistaken in stating that the acts creating national parks "universally" give the National Park Service authority to acquire land within their boundaries. The act creating Mount McKinley National Park is an instance to the contrary.

Considered in the light of all the other written and oral statements made to the committee by the agency, this particular statement may not fairly be regarded as a specific representation

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[15]The agency filed with the Senate subcommittee lists showing the parklands acquired with the general acquisition funds for fiscal years 1948, 1949, and 1950. For these three years there are listed several instances where this general acquisition fund had been used to acquire land without there being any authority other than this general fund to acquire such land by purchase or condemnation. The instances referred to include: (1948) Arches National Monument, Glacier Bay National Monument, Chaco Canyon National Monument, and Shiloh National Military Park; (1949) Carlsbad Caverns National Park; (1950) Lassen Volcanic National Park. Appellee does not dispute the government's advice to this court that in at least two of the seven listed instances condemnation proceedings were used: (1948 Chaco Canyon National Monument; (1949) Carlsbad Caverns National Park.

[16]"Senator McCARRAN. Have you not a statute under which you can acquire land within the national parks?

"Mr. DRURY. Yes; the act of 1916.

"Senator McCARRAN. And does that not include provision for the acquisition of land for national parks?

"Mr. DRURY. It gives us the authority, yes, Senator; but we still, of course, have to get the appropriations.

"Senator McCARRAN. And you have to get the authority from the Congress to create the park, do you not?

"Mr. DRURY. Yes. When the park is created, the act creating it generally, I think universally, gives us the authority to acquire the land within its boundaries." Senate Hearings, op. cit. at 230.

that acquisitions would be made only where there was independent authorization. The past practice over a period of three years, which the agency stated was a continuing program and which was reviewed in detail before the Senate subcommittee, argues to the contrary.

We hold that nothing in the legislative history of the 1951 appropriation act limits the broad language of the acquisition item in such a way that funds therefrom may not be expended in acquiring land within the exterior boundaries of Mount McKinley National Park.

Appellee states in his brief that Congress, having given authority to the Secretary of the Interior to acquire property and if necessary to condemn it in certain specific instances, "has denied the power to the secretary to acquire property by condemnation except where the authority is specifically given." If by this statement appellee intends to state that despite the broad language of the 1951 appropriation act the enactment of special authorizations with regard to named parks constitutes a denial of authority to acquire lands elsewhere, he has failed to document the assertion with any authorities.

Our research has failed to disclose any court decision announcing such a rule, and we are unaware of any general principle which lends it support.[17] Moreover, the consistent practice of the National Park Service over the years has been to the contrary. The fact that Congress continued the same appropriation with knowledge of this administrative understanding and practice constitutes virtual ratification of the adminstrative construction. Cf. Brooks v. Dewar, 313 U. S. 354.[18]

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[17]In this connection see 3 Sutherland, Statutory Construction sec. 6505 (3d ed. 1943), which states: "The rule that grants of the power of eminent domain are to be strictly interpreted against the government and in favor of the property owner generally has not been applied to federal statutes authorizing executive officers and public service corporations to condemn property. Emphasis has been focused upon the purposes to be accomplished, and such legislation has been treated with extreme liberality to effectuate the promotion of constitutional federal projects."

[18]We speak here, of course, of the construction to be placed upon the 1951 appropriation act. We are not concerned with any change of congressional policy which may have occurred since then.

The trial court and appellee seem to attach some significance to the fact that the acts relating to the establishment, boundaries, and control of Mount McKinley National Park contain provisos recognizing existing claims, locations, or entries.[19]

In our view this reservation of the existing rights of homesteaders or other claimants within the exterior boundaries of Mount McKinley National Park is irrelevant. The provisos are intended only to make certain that the acts creating Mount McKinley National Park do not of their own force disturb existing rights. They in no way disable a subsequent Congress from authorizing the acquisition of any such rights by purchase. And, as we have seen, if there was authority to acquire them by purchase, they could be condemned.

We hold that the Secretary of the Interior, acting through the National Park Service, has authority under the 1951 appropriation act to acquire the Kennedy tract.[20] He may therefore do so by condemnation pursuant to the authority conferred under 40 U.S.C.A. sec. 257.

The judgment is reversed and the cause is remanded for further proceedings.

(Endorsed) Opinion Filed April 13, 1960.

Frank H. Schmid, Clerk.

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[19]Title 16 U.S.C.A. secs. 348, 355. The proviso at the end of sec. 355, for example, reads:

> "... Provided further, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land."

[20]This is on the assumption that the Kennedy tract is within the exterior boundaries of Mount McKinley National Park, a fact not yet determined.

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I N D E X

SUBJECT INDEX

	Page
TABLE OF AUTHORITIES.....	1
JURISDICTIONAL ALLEGATIONS.....	1
OPENING STATEMENT.....	2
SPECIFICATION OF ERRORS.....	5
ARGUMENT.....	6
CERTIFICATE OF SUBSTANTIAL COMPLIANCE	9
EXHIBIT APPENDIX.....	10

TABLE OF AUTHORITIES

CASES

U.S. v. Rauers, 70 Fed. Rep. 748 (1) 7

STATUTES AND RULES

Federal Rules of Civil Procedure

Rule 16..... 8
Rule 71 a (c) (2)..... 6
Rule 73 a..... 1

26 Stat. 650..... 4,7,8
75 Stat. 246, 249..... 7

16 U.S.C. 47-1..... 3
28 U.S.C. 1358..... 1

APPENDIX D

No. 19355

In the

United States Court of Appeals

For the Ninth Circuit

PAUL F. PERATI, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL ALLEGATIONS

This is an action sounding in eminent domain, see complaint page 3, C.T. vol. one, and page 22 lines 21 and 22, and line 1, page 23 R.T., vol. two.

Title 28 U.S.C. 1358. The district court shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

Under Rule 73 (a) Federal Rules of Civil Procedure appellants appealed from the final judgment rendered on January 20th, 1964, and filed on January 29th,

1964 (pages 37 through 40, C.T. vol. one), and timely filed with the district court a notice of appeal on March 18, 1964 (C.T. vol. one, page 41).

OPENING STATEMENT

Appellee, plaintiff below, filed a complaint sounding in eminent domain, see pages 3 and 4 C.T. vol. one, but did not include a statement of any legislative authority for the taking, thus no eminent domain claim was stated.

Appellants, defendants below, properly filed an answer, see pages 23 through 26 C.T. vol. one, contesting the right of the government to take the land by a general denial, and titled certain contesting reasons and allegations as affirmative defenses, among these we raised estoppel, and put in issue each statute pleaded in the complaint, as not an authority to deprive this defendant of his land, see lines 29 through 32 on page 24 C.T. vol. one, and lines 1 through 5 on page 25 C.T.

Plaintiff filed a motion to strike these defenses titled affirmative defenses on the grounds they were immaterial, the conclusion of the defendant and did not present a justiciable issue, see pages 28 and 29 C.T. vol. one, this defendant resisted this motion (the memorandum does not

appear in the C.T.) see pages one through three Rep. Tr. vol. two.

Judge Halbert granted the motion of plaintiff, see pages 30 through 32 C.T. vol. one.

See lines 25 through 28 on page 30 C.T. of Judge Halbert's Memorandum an Order where Judge Halbert finds "The Government has initiated these proceedings for the condemnation of certain lands for the administration, protection, and development of Yosemite National Park". Now, please judicially notice that the only legislative authority to condemn land for the administration of Y.N.P. is under Pub. L. 85-922, cited as Title 16 U.S.C. 47-1, September, 1958, and this is to be in the Geographical area named El Portal. Also, please judicially notice that we have a geographical difference between the town of El Portal, and the townsite of Foresta where this appellants property is located. As an aside, the U.S. Court Commissioner has not as yet been moved into his El Portal quarters.

Defendant filed a motion to dismiss, see pages 33 through 36 C.T. vol. one, and pages 10 through 21 R.T. vol. two.

Here we again to protect the record pointed to the fact that plaintiff did not cite any statutory authority for the taking.

At this time we had marked for identification Defendants proposed exhibit A, see R.T. page 19, this was to show my land was outside 26 Stat. 650 cited by plaintiff as a basis or legislative authority for the complaint. We also had marked defendants exhibit B for identification. This was a map to show the court the land is not within the statutory citations pleaded by the Government, see page 20 R.T. vol. two.

Judge MacBride denied this motion, see page 21 R.T. vol. two.

Judge MacBride called a pre-trial hearing, see pages 22 through 28 R.T. vol. 2. We properly filed our pre-trial memorandum on December 13, 1963, see pages 43 A, 43 B, and 43 C, C.T. vol. one. See also lines 5 through 10 Rep. Tr. vol. two.

The order was made over our objection that the only issue to be resolved was just compensation, see lines 9 through 23 R.T. vol. two, page 26.

On January 20, 1964, before Judge Clark, we renewed our motion to dismiss on the grounds that plaintiff had not established or cited any legislative authority to condemn, see pages 3 and 4 R.T. (back of vol. 2). We also offered in evidence defendant's proposed exhibits A and B to show that El Portal and Foresta are

separate geographical areas, and my property does not come within the Forest Reserve Act pleaded by plaintiff, see pages 4 and 5 R.T. Motion denied.

SPECIFICATION OF ERRORS

I

The court errored in not considering and judicially taking notice of the Declaration of Homestead and the U.S. Government map when marked as proposed exhibits A and B. These show my land is not within the pleaded statutes. See page 19, R.T. vol. two.

II

The court errored in rejecting defendants offer of exhibits A & B on January 20, 1964, pages 4 & 5 of Judge Clark's transcript vol. 2, also see page 7. These would establish that El Portal and Foresta (where my land is) are separate geographical areas, and that this land is outside the Forest Reserve Act pleaded by plaintiff.

III

The court errored in granting plaintiffs motion to strike defendants defenses titled separate and affirmative defenses.

IV

The court errored in the pre-trial order, and did not consider the fact that defendants did not waive any matter covered in defendants pre-trial memo.

V

The court errored in denying defendants motion to dismiss filed November 4, 1963.

VI

The court errored in denying defendants motion to dismiss on January 20, 1964.

VII

The Declaration of Taking, (pages 17 through 21, C.T. vol. one) is not legally sufficient.

ARGUMENT

Under Rule 71A (c) (2), Federal Rules of Civil Procedure the COMPLAINT must contain a short and plain statement of the authority for the taking.

Page 3, C.T. vol. one, plaintiff cites four laws as authority for the taking.

Under U.S. vs. Rauers, 70 Federal Rep. 748 (1), express legislative power is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such power must be strictly construed.

The Appropriation Act, approved August 3, 1961, 75 Stat. 246, 249, provides in part, "National Park Service, Management and Protection, for expenses necessary for the management and protection of the areas and facilities administered by the National Park Service, including protection of lands in process of condemnation; and for plans------.

This act covers 50 states, my land was not part of the area or facilities administered by the National Park Service, and as this complaint was filed May 28, 1962, my land was not in the process of condemnation.

Plaintiff also cited on page 3, C.T. vol. one, as authority for the taking, the Act of October 1, 1890, 26 Stat. 650. This act is conceded to be the Act which established Yosemite National Park, see page 23 of the U.S. Department of the Interior publication titled "Yosemite National Park", U.S. Government printing office, document #1961-0-581815. This Act provided for the means to EXCLUDE portions of Section 3, Township 3 South, Range 20 East,

M.D.B.M. from the operation and jurisdiction of this cited act of 1890 (the land subject to this appeal is within sec. 3, see page 5 C.T. vol. one). Thus this cited Act establishes with the exhibits of defendants, the position of the defendants, not the authority of plaintiff to take.

Section 1107 California Civil Code provides, every grant of an estate in real property is CONCLUSIVE against the grantor. Thus the President Cleveland grant to McCauley, conclusively took this land out of 26 Stat. 650.

The other two Acts cited on page 3 of C.T. vol. one, are procedural methods, not authority for taking.

12 Am Juris. 2nd 547, Sec. 1. A boundary is the marking or dividing line between two parcels of land, and a boundary point is the extremity of such land. As we have no National Park Land west of this appellants land, we are not within the boundaries of Y.N.P.

This appellant did not waive any items covered in his pre-trial memo, thus under Rule 16, Rules of Civil Procedure, they should have been considered by the District Court.

Our answer was valid. See Federal Practice and Procedure, Barron and Holtzoff, Wright ed., vol. 1A, pages 145 & 146, sec. 277. The defense (allowed by Rule 8 (b)) must be stated in short and plain terms, its averment must be simple, concise and direct, and no technical forms are required; seemingly CONCLUSIONS OF LAW are fully as permissible in the answer as they are in the complaint.

AND vol. 3 of Federal Practice & Procedure, sec. 1522, page 562, "The only function of the answer is to contest the right of the government to take the land". This we have done at every step.

Respectfully,

_____

In propria persona

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in substantial compliance with those rules. Please note: the word substantial.

_____

EXHIBIT APPENDIX

	Transcript Volume Two, Page
Declaration of Homestead	11
U.S. Government Map	11
Declaration of Homestead, marked proposed Exhibit A.	19
U.S. Government Map, marked proposed Exhibit B.	20
Declaration of Homestead	*
U.S. Department of Interior topographical map	*

* Covered in my pre-trial memorandum, but not shown in my copy of the C.T. vol. one. I have been informed it is now in the record as pages 43 A, 43 B, & 43 C, vol. one.

Declaration of Homestead signed by President Grover Cleveland, and U.S. Government map, offered in evidence on pages 4 and 5, Judge Clark's transcript, vol. two, and see also page 7. Offer denied.

These were offered to prove that El Portal and Foresta are separate geographical areas, that this property is outside the jurisdiction of the Forest Reserve Act pleaded by plaintiff. And these exhibits will establish that my land is outside the boundaries of Yosemite National Park.

I N D E X

SUBJECT INDEX

	Page
ANSWER.....	1
BOUNDARY.....	4
ANSWER FILED IN TIME.....	4
APPELLEE FAILS TO PLEAD AUTHORITY..	5
CONGRESS DESIGNATES THE LAND TO BE ACQUIRED FOR THE ADMINISTRATION, ETC. OR YOSEMITE NATIONAL PARK.....	5
JUDICIAL NOTICE.....	6
ARGUMENT.....	8

TABLE OF AUTHORITIES

CASES

Bishop v. U.S. 288 Fed. 2d, 525,(2).....	10
Hagen v. Porter 156 Fed. Rep. 2d, 362,(7) at 365	6
Panama Ref. Co. v. Ryan 293 U.S. 388(5),(7 & 8) 421, (12) .432.....	7, 10
Polson Logging and U.S. v. Kennedy.	8
Schechter Poultry Corp. v. U.S. 295 U.S. 495,(2) 529,(3) 530....	7, 10
So. Shore Land Co. v. Petersen 26 Advance Calif. Appellate Rpts, 905,(29) 921,(33, 34, 35, 37, 39,) 924.....	6

APPENDIX D

Page

U.S. v. Rauers
70 Fed. Rep. 748(1)..... 2

STATUTES AND RULES

Federal Rules of Civil Procedure

Rule 43(a)..... 6

Section 71(a)..... 5

26 Stat. 650..... 6, 9
75 Stat. 246, 249.....6, 9, 10

16 U.S.C....47-1..... 6-10
40 U.S.C. 257..... 9
40 U.S.C. 258(a)..... 9

TEXTS

12 American Juris 2d, 547..... 4
12 American Juris 2d, 633..... 3
29 Corpus Juris Secundum, pg 806..... 2

No. 19355

In the

United States Court of Appeals

For the Ninth Circuit

PAUL F. PERATI, et. al.,	)
Appellants,	)
-vs-	)
UNITED STATES OF AMERICA,	)
Appellee.	)

APPELLANT'S REPLY BRIEF

Appellant replies to the brief for the United States as follows:

Pages one and two raise the question as to whether or not the Appropriation Act dated August 3rd, 1961, coupled with 40 U.S.C. 257, authorized the condemnation of the appellant's land (which it is claimed is within Yosemite National Park).

Answering 40 U.S.C. 257, first. This is a procedural or mechanical statute, which points to a procedure to follow after a officer of the Government has been authorized to procure real estate for the erection of a public building, or for other public use.

Thus, before this procedural statute is effective, we must have a legislative authorization to obtain the real estate for the public building, or to obtain the real estate for public use as determined by the legislature, and only in furtherance of specific

legislation. The necessity and extent of the taking is a legislative question.

It is basic that express legislative power is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such power must be strictly construed.

A land mark case, see U.S. vs. Rauers, 70 Fed. Rep. 748 (1). See also, Vol. 29, Corpus Juris Secundum, page 806, Eminent Domain, "Such power of eminent domain being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner.

The Appropriation Act dated August 3rd, 1961, page 3, brief for the United States.

The Management and Protection provision; This furnishes funds for the management and protection of the areas and facilities administered by the National Park Service, and protection of lands in the process of condemnation.

My land, the land in issue, ~~is and~~ was not an area or facility administered by the National Park Service, nor was it in the process of condemnation, the date of this Act being August 3, 1961.

The second portion of this act as cited on page 3, U.S. brief, of an appropria-

tion of $5,350.00 for the acquisition of lands, interests therein, improvements, and related personal property (was not ignored by appellant, page 6, line 19, U. S. brief, as it did not apply) is not material or relevant to this action, all of which appears from the following:

See the Declaration of Taking, page 17, Vol. one, Transcript of Record. Now please look at First: (a) Here the United States pleads its authority to take is based upon the act of October 1, 1890 (26 Stat. 650), that the Appropriation Act dated August 3, 1961, makes funds available to take the land pursuant to and under the authority contained in the act of October 1, 1890.

Our proposed exhibits "A" and "B", show that my land is outside the provision of 26 Stat. 650, (and also the administration allegation on page 18, Vol. one, Transcript of Record) and this is a proper subject for judicial notice.

II

Replying to lines 4 and 5, page two, U. S. brief, that my land is within Yosemite National Park.

Please see Vol. 12, American Juris 2d, page 633, Sec. 99, "The burden of proof upon an issue as to a boundary is upon the party

having the affirmative of that issue. This burden must generally be established by a preponderence of the evidence.

Also, please see 12 American Juris 2d, page 547, Sec. one. A "boundary" is the marking or dividing line between two parcels of land, and a boundary point is the extremity of such land. Citing Ballentine's Law Dictionary.

We have no National Park Land west of the land in issue, the extremity or limit of the National Park land administered by the National Park Service is east of the land in issue, thus my land is not within Yosemite National Park.

III

Answering the last paragraph, page 3, U. S. brief.

At this point we would like to point out a printing error on page 8, U. S. brief. The last paragraph appears to state, "Notice was served in May, 1962."

Appellant received notice of the complaint for parcel 87 on July 13, 1962, after his answer for parcels 85 and 87 had been filed. In fact the U. S. motion to strike was dated July 12, 1962.

See also, Vol. two, Transcript of Record,

page 14, where I inquired if my answer was filed late, and the U. S. answered, "Well, I am not sure of the date."

My answer to parcel 87 was filed before I received notice of the complaint, thus it could not be late, nor is there any question as to parcel 85.

The answer filed, page 24, Vol. one, Transcript of Record, Para. III, lines 29 over to line 5, page 25, stated my objections and defenses; that plaintiff did not state a cause of action, as 75 Stat. 246, and 25 Stat. 357, and 26 Stat. 650, and 46 Stat. 1421, do not contain authority to deprive this appellant of his land.

Section 71-a, Fed. R. Civil Procedure, requires the statutory authority for the taking be pleaded. No statutory authority appears in the Declaration of Taking, see page 17, Vol. one, Transcript of Record.

IV

Answering the first paragraph under Statement, page 4, U. S. brief.

Error, as Congress spelled out the necessity and extent of the taking for the administration and development of Yosemite National Park, in Title 16, U.S.C., Sec. 47-1, and this was not cited in the United States Declaration of Taking, or Complaint,

and this section does not apply to the land in issue.

Congress did appropriate funds for the protection of Yosemite National Park in 75 Stat. 246, 249, and restricted the funds to areas administered by the National Park Service, plus lands in the process of condemnation.

My land is not within these two sections, nor does the record show any authority to take my land for any public use. The taking of land for public use is covered in 16 U.S.C. 47-1, and does not apply to my land, nor does 26 Stat. 650.

Answering the last paragraph, page 4, to protect the record, we objected to the only issue being compensation, see page 26, Vol. two, Transcript of Record.

V

Rule 43(a), Federal Rules of Civil Procedure, the United States Courts may take judicial notice. In accord see Hagen vs. Porter, 156 Fed. Rep. 2d, 362, (7) at 365, and; South Shore Land Company vs. Petersen, 26 Advance California Appellate Reports, 905, (29) 921, (33, 34, 35, 37, 39,) 924.

Thus, appellants proposed exhibits "A" and "B", are within judicial notice.

VI

It is basic, that where a statute delegating legislative power fails to set forth sufficiently definite standards, the uncontrolled delegation will be held invalid.

For persuasive authority on the uncontolled delegation of legislative power, see Panama Ref. Co. vs. Ryan, 293 U.S. 388(5), (7 & 8) 421, (12) 432. and;

Schechter Poultry Corp vs. U.S., 295 U.S. 495,(2) 529, (3) 530.

The Appropriation act relied on by the Unite d States does not contain any guide or standard, except when taken with Title 16, U.S.C. Sec. 47-1; (a) Authorizes an administrative site in El Portal, so that the facilities and service required in the operation and administration of Yosemite National Park may be located on such site outside the park.

(e) Until further action by Congress, the lands acquired shall not become a part of the Yosemite National Park.

(f) Funds now or hereafter appropriated or other wise available for operating and capital programs in the areas administered by the National Park Service, including funds for acquisition of land and interests in land, are made available to acquire land, interests in land, and appurtenances thereto, within the administrative site, and to further the purpose of this section.

This cited act shows that Congress has selected the land and capital program for the administration and development of Yosemite National Park, and has laid down standards and guides to be followed, and my land is not within the area selected by Congress.

ARGUMENT

The taking of parcels 85 and 87 was not authorized. Polson Logging and U.S. vs. Kennedy are not authority for the contention of appellee in this action.

In passing, U.S. vs. Kennedy in the trial court, not only was a well reasoned case, but a model opinion. However, among other factors, Kennedy on appeal did not bring in his defense of the uncontrolled delegation of legislative power.

In the instant case, the United States filed a Declaration of Taking, pages 17 and 18, Vol. one, Transcript of Record, wherein the Solicitor of the Department of the Interior, stated he selected my land for use in connection with the administration, protection, and development of Yosemite National Park.

That pursuant to law he selected for acquisition for the purpose of the cited acts of Congress, my land in the County of Mariposa, etc.

(The Solicitor also stated, That the public use for which my land was taken, was that my land was within the boundaries of Yosemite National Park his unsupported contention, and that my land was needed for the administration and development of the area, again overlooking the fact Congress held to the contrary).

In an attempt to be within Section 71a, the United States cited four code sections as the basis of its authority: (1) 40 U.S.C. Sec. 258a, (2) 40 U.S.C. Sec. 257, (3) 26 Stat. 650, and; (4) 75 Stat. 246.

(Again, we do not want to overlook the fact that the United States failed to cite Title 16, U.S.C. 47-1, which expressly lays down the guides and standards to be applied in connection with the administration and development of Yosemite National Park.)

Two of the code sections cited by the United States, those in 40 U.S. Code, are procedural statutes, in and of themselves confer no authority to condemn.

The third statute cited as authority by the United States, 26 Stat. 650, (this is the statute that created Yosemite National Park) is the statute that they contend is the authority for the taking, see page 17, Declaration of Taking. But what has been overlooked here, is that this congressional act, not only is not authority to take my

land, but by act and operation of law with the cooperation of the Executive Branch of the United States this law excluded my property from the restrictions attached to the land that was expressly removed from going into private ownership. Thus, this act not only is not authority for the Declaration of Taking, but provides we are outside its scope.

The fourth statute cited by the United States, 75 Stat. 246, 249, must, as all statutes, be read in light of its constitutional overtones, see Bishop vs. U.S., 288 Fed. 2d 525,(2).

Any application of 75 Stat. 246, outside the guides and standards, or without the required guides and standards, necessary in any delegation of legislative authority, flies in the face of Panama vs. Ryan, 293 U.S. 388, and Schechter Poultry vs. U.S., 295 U.S. 495.

Here the attempt to use this act to take my land under the phantom authority alleged to be contained in the act of October 1, 1890, see line 9, page 17, Vol. one, Transcript of Record, is certainly outside the guides and standards laid down by Congress.

In Title 16, U.S.C., Sec. 47-1, Congress laid down the guides and standards to be applied in the administration, protection

and development of Yosemite National Park, and my land is outside the area selected by Congress.

As mentioned before, my land not being administered by the N.P.S., the Management and Protection provisions on page 3, brief for the United States do not apply.

In the light of the above, it is requested that the judgment below be reversed and our land returned.

Respectfully,

PAUL F. PERATI
In propria persona

Dated: January 18, 1965.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in substantial compliance with those rules.

Attorney

Title 16, U.S.C. 47-1. Administrative Site.

(a) To enable the Secretary of the Interior to preserve the extraordinary natural qualities of Yosemite National Park, notwithstanding its increasing use by the public, the Secretary is hereby authorized to provide in the manner hereinafter set forth an administrative site in the El Portal area adjacent to Yosemite National Park, in order that utilities, facilities, and services required in the operation and administration of Yosemite National Park may be located on such site outside the park.

(b) For said site the Secretary of the Interior is authorized to acquire by purchase or donation, or with donated funds, approximately twelve hundred acres, as shown on map numbered NP-YOS-7011, of non-Federal land, interests in land, and appurtenances thereto, and to avoid severing parcels in private ownership which extend beyond the area so depicted, the Secretary of the Interior may acquire in their entirety such parcels of land or interests therein.

(d) Nothing herein contained shall affect any valid claim, location, or entry existing under the land laws of the

United States, or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land.

(e) Until further action by the Congress, the lands acquired by or transferred to the Secretary of the Interior hereunder shall not become a part of Yosemite National Park, nor be subject to the laws and regulations governing said park, but the Secretary of the Interior shall have supervision, management, and control of the area and shall make and publish such rules and regulations as he may deem necessary and proper for its use and management: Provided,**********.

(f) Funds now or hereafter appropriated or otherwise available for operating and capital programs in the areas administered by the National Park Service, including funds for acquisition of land and interests in land, are made available to acquire land, interests in land, and appurtenances thereto, within the administrative site, and to further the purpose of this section. Pub. L. 85-922, Sec. 1-6, Sept. 2, 1958, 72 Stat. 1772.

Title 16, U.S.C. 46. Yosemite National Park; lands segregated from and included in the Sierra National Forest:

All those tracts or parcels of ground described in section 471c of this title, but not included within the metes and bounds of the land hereinafter described are included and made a part of the Sierra National Forest, namely: The tracts of land in the State of California known and described as follows: Beginning at the point where the middle of the channel of the South Fork of the Merced River intersects the line between sections 3 and 4, township 4 south, range 20 east, Mount Diablo base and meridian; thence northerly along section lines through the middle of townships 3 and 4 south, range 20 east, to the northwest corner of sectuin 3, township 3 south, range 20 east; thence westerly along township line to the southwest corner of section 33, township 2 south, range 20 east; thence northerly along section lines to the northwest corner of section 21, said township; ****** not needed *******. The lands above described are reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands, subject to all the provisions of sections 61, 471c and 471d of this title.

The Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land

herein segregated from the Yosemite National Park and made a part of the Sierra National Forest accorded under sections 79 and 522 of this title, and other sections concerning rights-of-way over public lands; and the moneys received from the privileges accorded on the lands herein segregated and included in the Sierra National Forest shall be paid into the Treasury of the United States as provided by law.

The forest lands herein set aside and reserved shall be known as the "Yosemite National Park". February 7, 1905. C 547, sec. 1. 33 Stat. 702.

Title 16 U.S.C. 471c, also cited as 26 Stat. 650.

Lands in California set aside as reserved forest lands.

The tracts of land in the State of California known and described as follows: Commencing at the northwest corner of township 2 north, range 19 east Mount Diablo meridan, thence eastwardly on the line between townships 2 and 3 north, range 24 and 25 east; thence southwardly on the line between ranges 24 and 25 east to the Mt. Diablo base line; thence eastwardly on said base line to the corner to township 1 south, range 25 and 26

east; thence southwardly on the line between ranges 25 and 26 east to the southeast corner of township 2 south, range 25 east; thence eastwardly on the line between townships 2 and 3 south, range 26 east to the corner to township 2 and 3 south, ranges 26 and 27 east; thence southwardly on the line between ranges 26 and 27 east to the first standard parallel south; thence westwardly on the first standard parallel south to the southwest corner of township 4 south, range 19 east; thence northwardly on the line between ranges 18 and 19 east to the northwest corner of township 2 south, range 19 east; thence westwardly on the line between townships 1 and 2 south to the southwest corner of township 1 south, range 19 east; thence northwardly on the line between ranges 18 and 19 east to the northwest corner of township 2 north, range 19 east, the place of beginning are reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands; and all persons who shall locate or settle upon or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom.

Nothing in this section and sections 55, 61, and 471d of this title shall be

construed as in anywise affecting any bona fide entry of land made within the limits above described under any law of the United States prior to October 1, 1890. October 1, 1890, 26 Stat. 650.

Rule 19, Supreme Court Rules

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Title 28 U.S.C. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 989

PAUL F. PERATI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 352 F.2d 788.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1965. The petition for a writ of certiorari was filed on February 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Department of the Interior and Related Agencies Appropriation Act, 1962 (75 Stat. 246, 249) and the Act of August 1, 1888, as amended, (40 U.S.C. 257) authorized the condemnation of petitioners' lands within the boundaries of Yosemite National Park.

STATUTES INVOLVED

The relevant portion of the Act of June 25, 1948, 62 Stat. 869, 986, 40 U.S.C. 257, provides:

> That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this Act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The relevant portion of the Department of the Interior and Related Agencies Appropriation Act, 1962, 75 Stat. 246, 249, provides:

> NATIONAL PARK SERVICE
>
> MANAGEMENT AND PROTECTION
>
> For expenses necessary for the management and protection of the areas and facilities admin-

istered by the National Park Service, including protection of lands in process of condemnation; and for plans, investigations, and studies of the recreational resources (exclusive of preparation of detail plans and working drawings) and archeological values in river basins of the United States (except the Missouri River Basin); $21,786,500.

* * * *

CONSTRUCTION

For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of buildings, utilities, or other facilities or equipment damaged or destroyed by fire, flood, or storm, or the construction of projects deferred by reason of the use of funds for such purposes; the acquisition of water rights; and not to exceed $5,350,000 for the acquisition of lands, interest therein, improvements, and related personal property; $34,476,000, to remain available until expended.

STATEMENT

In May, 1962, the United States condemned the fee title to 114 parcels of land, which included Parcels 85 and 87 owned by petitioners, for use in connection with the administration, protection and development of the Yosemite National Park by the National Park Service, Department of the Interior.[1] A declaration

[1] Although within the boundaries of the Park, petitioners' lands were not Park land because, prior to the creation of the Park, homestead entry had been made by a predecessor in interest of petitioners and a homestead grant had followed. The statute creating the Park provided that such existing claims would not be affected. Act of October 1, 1890, 26 Stat. 650, 16 U.S.C. 471c.

of taking was filed with the complaint. The parties stipulated that the highest and best use of the two parcels was for "mountain cabin sites."

Petitioners' answer (R. 23), which challenged the authority to take, was stricken (R. 30-32). By agreement of the parties, the issue of just compensation was decided by the district court, which awarded $450 for each parcel (R. 37, 39-40). The court of appeals affirmed, holding that the taking was authorized (Pet. App. A).

ARGUMENT

The court of appeals correctly determined that Section 1 of the Act of August 1, 1888 (25 Stat. 357), as amended by Section 6 of the Act of June 25, 1948 (62 Stat. 869, 986, 40 U.S.C. 257), and the Department of the Interior and Related Agencies Appropriation Act, 1962 (75 Stat. 246, 249), authorized the taking of the parcels involved. The 1888 Act, as amended, provides that whenever a government officer is "authorized to procure real estate" he may acquire it by condemnation. The 1961 Act appropriated $21,786,500 "for the management and protection of the areas and facilities administered by the National Park Service," explicitly including "$5,350,000 for the acquisition of lands, interest therein, improvements, and related personal property * * *."

Statutory authorization to procure real estate may thus be evidenced through an appropriation act. It is settled, moreover, that, as recited in the 1888 Act, as amended, the government's power to condemn is co-

extensive with its power to purchase. *United States ex rel T.V.A.* v. *Welch*, 327 U.S. 546, 554; *Hanson Co.* v. *United States*, 261 U.S. 581, 587; *United States* v. *Kennedy*, 278 F.2d 121, 127 (C.A. 9). An appropriation act and the 1888 Act, as amended, have, therefore, in many previous cases, provided the basis for condemnation. *Polson Logging Co.* v. *United States*, 160 F.2d 712, 714 (C.A. 9); *United States* v. *Kennedy*, 278 F.2d 121, 122-127 (C.A. 9); *United States* v. *Threlkeld*, 72 F.2d 464, 465-466 (C.A. 10), certiorari denied, 293 U.S. 620; *United States* v. *Certain Real Estate, Etc.*, 217 F.2d 920, 925 (C.A. 6).

While Yosemite National Park is not named in the 1961 Appropriation Act, there is nothing in that Act or in other statutes relied on as authorizing the taking to indicate a congressional purpose to exclude acquisitions within that particular Park.[2] Indeed, Congress was expressly advised in the committee hearings on the bill (H.R. 6345) which became the Appropriation Act that 250 acres within the Yosemite National Park would be acquired with available funds and that 75 acres were to be acquired with funds requested.

---

[2] Petitioners' assertion that the Government never even pleaded that the lands involved were within the exterior boundaries of the Park and their request that a remand be granted for a boundary determination are without merit (Pet. 12-13). The Secretary of the Interior, in the declaration of taking, determined that "[t]hese lands, situated within the boundaries of the Yosemite National Park, California, are needed for the proper administration, preservation, and development of that area for the benefit and enjoyment of the people" (R. 18). The condemnation complaint, moreover, described the lands involved with particularity (R. 5-8).

Hearings, Subcommittee of the House Committee on Appropriations, H.R. 6345, 87th Cong., 1st Sess. (1961) pp. 337-338, 1410; Hearings, Subcommittee of the Senate Committee on Appropriations, H.R. 6345, 87th Cong., 1st Sess. (1961) p. 433.

The fact that petitioners hold homestead claims (Pet. 4, 13) does not require a different result. The provision of the 1890 statute creating Yosemite Park, providing that existing homestead claims would not be affected (Act of October 1, 1890, 26 Stat. 650, 651, 16 U.S.C. 471c), clearly did not disable Congress from subsequently authorizing the acquisition of such homestead rights by purchase or condemnation. See *United States* v. *Kennedy*, 278 F.2d 121, 127 (C.A. 9). As the legislative history shows, Congress in fact understood its 1961 authorization as extending to the acquisition of such privately owned homestead claims remaining within the National Parks. See Hearings, Subcommittee of the House Committee on Appropriations, *supra*, pp. 1400-1401; Hearings, Subcommittee of the Senate Committee on Appropriations, *supra*, pp. 431-433.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
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MARCH 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 989

PAUL F. PERATI, et al.,
Petitioners
vs.
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Petition for a Rehearing

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INDEX

	Page
I. Land Outside of Park Since 1905	2
II. Declaration of Taking Cannot Cure Defects in a Complaint	3
III. A Change of Theory, After the Answer Is Filed, Is Outside the Issues and Error	4
Certificate	5

TABLE OF AUTHORITIES CITED

Cases	Pages
U.S. v. Dow, 357 U.S. 17, 23	3

Statutes	
Rule 71A, Rules of Civil Procedure	4
Section 46 U.S.C., Title 16	2
Section 471c, U.S.C., Title 16	2
26 U.S. Stat. 650	4, 5
16 U.S.C., 61 and 471d	2
40 U.S.C. 258a	3, 4
75 Stat. 246	4, 5

In the Supreme Court of the United States

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PAUL F. PERATI, et al.,
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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Petition for a Rehearing

Petitioner, (appellant below) in the above entitled petition for a writ of certiorari, filed in this court, and on which a decision was rendered and entered on March 28th, 1966, respectfully requests a rehearing, and prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, for the Ninth Circuit, San Francisco, California, to the end that this case may be reviewed and determined by this Court, on the following grounds:

I

PETITIONERS LAND (the land in issue) IS NOT AND HAS NOT BEEN WITHIN THE EXTERIOR BOUNDARIES OF YOSEMITE NATIONAL PARK, Since February, 1905, when 33 Stat. 702, c. 547, sec. 1, also cited as, sec. 46, of Title 16, U.S.C., "Yosemite National Park; *lands segregated from and included* in Sierra National Forest;" was enacted, all of which appears from the following:

To paraphrase the above, we have a legislative mandate that all of the land described in section 471c U.S.C. Tit. 16 but not included within the metes and bounds of the land hereinafter described are included and made a part of the Sierra National Forest, code description follows .....

The above described lands are SUBJECT TO (dependent on) all the provisions of sections 61, 471c and 471d, Tit. 16 U.S.C. Thus, the metes and bounds "thence northerly along section lines through the middle of townships 3 and 4 south, range 20 east, to the northwest corner of section 3, township 3 south, range 20 east, to the northwest corner of section 3, township 3 south, range 20 east;" *is conditioned on and subject to the provision in section 471c.*

This petitioners (marked for identification, see page 19) Rept. Trans. Exhibit A, executed by President Grover Cleveland, (and offered in evidence on January 20, 1964, but refused, see page 4, reporters transcript) clearly established a PENINSULA of land in section 3 (which contains the subject land in issue) and this PENINSULA is firmly attached to portions of land in sections 4 and 9, T. 3 S., Range 20 E., and this was within the power of the Honorable Grover Cleveland, President of the United States.

(See the complaint, filed May 28th, 1962, page 5, vol. one Transcript of Record, filed in the District Court,

wherein the Government pleads the subject land is in the County of Mariposa, State of California, Townsite of Foresta, but does not plead that the land is within the exterior boundaries of Y.N.P., nor did the Government amend the complaint to include this).

The last sentence of the above cited section 46, provides as follows "THE FOREST LANDS HEREIN SET ASIDE AND RESERVED SHALL BE KNOWN AS THE 'YOSEMITE NATIONAL PARK'."

Thus, my land is not within the boundaries, by act and operation of law. *This is a matter that the Government was under a duty to establish in the trial court if it were able to change its theory from the one pleaded in the complaint, to a different theory, and plead its authority to take was due to and flowed from the Appropriation Act.*

II

The Government's position (page 5, Brief for the United States in Opposition) "that the failure to plead in the condemnation complaint that the land involved is within the exterior boundaries of the Park was cured as the Secretary of the Interior in the declaration of taking, determined that these lands were situated within the boundaries of the Yosemite National Park, California."

Associate Justice John M. Harlan, 1958, in *United States v. Dow,* 357 U.S. 17, 23, states the rule is as follows: "The Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding "ancillary or incidental to suits brought under other statutes".

Thus, it is clear, that the Taking Act, 40 U.S.C. 258a, cannot fill in deficiencies or change the theory of a con-

demnation complaint filed and at issue under Rule 71A, Federal Rules of Civil Procedure.

III

After an answer is filed, and the complaint is at issue, may a complaint change the theory of the case without amending the complaint?

In the instant case, the United States in the complaint filed under Rule 71A, Federal Rules of Civil Procedure (C)(2), pleaded its authority for the taking was 40 U.S.C. 258a; and the ACT OF OCTOBER 1, 1890 (26 Stat. 650), AND ACTS SUPPLEMENTARY THERETO AND AMENDATORY THEREOF AND THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION ACT, 1962, APPROVED AUGUST 3, 1961 (75 Stat. 246), *WHICH MAKES FUNDS AVAILABLE FOR SUCH PURPOSE;*

Thus, the theory of the complaint that the authority for the taking was the Act of October 1, 1890, and that the Appropriation Act, 75 Stat. 246, made funds AVAILABLE FOR THE PURPOSE OF 26 Stat. 650, was changed after the answer was in, and it was clear that the Act of 26 Stat. 650 was not authority for the complaint, to a theory that the authority for the taking FLOWED FROM AND WAS VESTED IN the Appropriation Act, 75 Stat. 246.

Thus in practice and effect, this petitioner was not in a position to file a complete answer as allowed by Rule 71A(e) and the judgments of the District Court, and the U.S. Court of Appeals being outside of, and in excess of the issues established by the pleading titled Complaint in Condemnation, was in excess of jurisdiction, and should be reversed.

Pages 3 and 4 of the Reporter's transcript, dated January 20, 1964, establishes that we contested the position of the Government at every step.

Respectfully,

/s/ PAUL F. PERATI
Paul F. Perati

CERTIFICATION

Petitioner certifies that the within petition for a rehearing is presented in good faith, and not for delay, and further certifies that the petition is to be restricted to the grounds that:

1. The land in issue has not been within the exterior boundaries of Yosemite National Park since February, 1905, and that the Government did not plead in its complaint, or establish, that the land in issue was within the Park boundaries.
2. A Declaration of Taking cannot cure defects in a complaint in condemnation.
3. In the absence of an amended complaint, when it is pleaded in the complaint, that the authority for the condemnation is based upon and thus flow from 26 U.S. Stat. 650, and it is alleged that the Appropriation Act 75 U.S. Stat. 246 makes funds available for the purpose of 26 Stat. 650, it is outside the issues to hold the authority for the taking flows from the Appropriation Act.

Respectfully,

/s/ PAUL F. PERATI
Paul F. Perati
In Propria Persona